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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/639,690	08/16/2000	ANDREW K. BENSON	101997-5	3073

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ONE INTERNATIONAL PLACE  
BOSTON, MA 02110

EXAMINER

KATCHEVES, KONSTANTINA T

ART UNIT	PAPER NUMBER
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1636

DATE MAILED: 03/26/2002

13

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/639,690	BENSON, ANDREW K.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Konstantina Katcheves	1636	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 02 January 2002.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-9, 14-21 and 23-25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9, 14-21 and 23-25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                          | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) <u>10</u> . | 6) <input type="checkbox"/> Other: _____                                    |

### **DETAILED ACTION**

Claims 1-9, 14-21 and 23-25 are pending in the instant application.

#### ***Response to Amendment***

Claims 14, 17-20 and 23-25 stand rejected under 35 U.S.C. 102(e) as being anticipated by Heynecker (U.S. Patent 6,057,100), for the reasons made of record in the prior Office Actions and for the reasons presented below.

Claims 14-21 and 23-25 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Heyneker et al. as applied to claims 14, 17-20, and 23-25 above, and further in view of Anderson, Bruckner-Lea et al., Bergeron et al., Nakayama et al., and Tauxe, for the for the reasons made of record in the prior Office Actions.

Claims 1-9, 14-21 and 23-25 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Heyneker et al., Anderson, Bruckner-Lea et al., Bergeron et al., Nakayama et al., and Tauxe, as applied to claims 14-20 and 23-25 above, and further in view of Megerle (U.S. Patent 5,874,046) for the reasons of record set forth in the prior Office Actions.

Claims 14, 17-20, and 23-25 stand rejected under 35 U.S.C. 102(e) as being anticipated by Balch (U.S. Patent 6,083,763) for the reasons of record set forth in the Office Action mailed 15 June 2001.

Claims 1-9, 14-21, and 23-25 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Balch, as applied to claims 14, 17-20, and 23-25 above, in view of Megerle (U.S. Patent 5,874,046), and further in view of Anderson, Bruckner-Lea et al. (1999), Bergeron

et al., Nakayama et al., and Tauxe (1997) for the reasons of record set forth in the Office Action mailed 15 June 2001.

***New Grounds of Rejection Necessitated by Applicant's Amendment***

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-9 and 14-21 and 23-25 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1 has been amended to recite the language "quality of processing" and "effective adjustment." Claim 14 also recites the language "effective adjustment." This terminology is qualitative and relative in nature such that one of skill in the art could not envision or reasonably determine the metes and bounds of the claim.

***Response to Arguments***

Applicant has not provided any new grounds of argument for the rejections of record. All arguments have been addressed in the prior Office Action mailed 15 June 2001. However, the arguments presented and the amendments to the claims have been addressed below.

First, Applicant's amendments to the instant claims fail to limit the claims such that the prior art of record is overcome. Claims 1 and 14 recite the additional language "wherein the target species include species affecting quality or processing of the food product." This language

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does not overcome the rejections of record because it includes other species as well as those affecting quality or processing of food. Moreover, the amendment is not applicable because it recites relative language to define a characteristic of a microorganism such that one of skill in the art would not be able to determine what Applicant intends to claim. Also, Applicant's recitation of the language, "effective adjustment" does not render the claim patently distinct because of its relative and undefined nature as discussed in the rejection under 35 U.S.C. 112, first paragraph above.

Applicant also argues that "the notion of forming a database of food product microbiology distribution is believed to be new" and that "the application of multistep array testing . . . amounts to a conceptually quite different method." Applicant in the arguments has done little more than assert patentability. Applicant has failed to provide argument relating to the rejections of record. The Amendment and Response fails to provide any specific arguments as to how the instant claims are novel over the prior art of record. Applicant's amendments and assertion of patentability and intended use has not rendered the instant invention patentable over the prior art.

*Conclusion*

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Konstantina Katcheves whose telephone number is (703) 305-1999. The examiner can normally be reached on Monday through Friday 7:30 to 4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Dr. Remy Yucel, Ph.D. can be reached on (703) 305-1998. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 305-3014 for regular communications and (703) 305-7939 for After Final communications.


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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 305-3388.

Konstantina Katcheves  
March 22, 2002

  
REMY YUCEL, PH.D  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 1600